COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-686

No. 73-687

TELEPHONE USERS ASSOCIATION, INC.,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA
and
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,
Respondents.

On Petitions for Writs of Certiorari to the District of Columbia Court of Appeals

BRIEF FOR RESPONDENT THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY IN OPPOSITION

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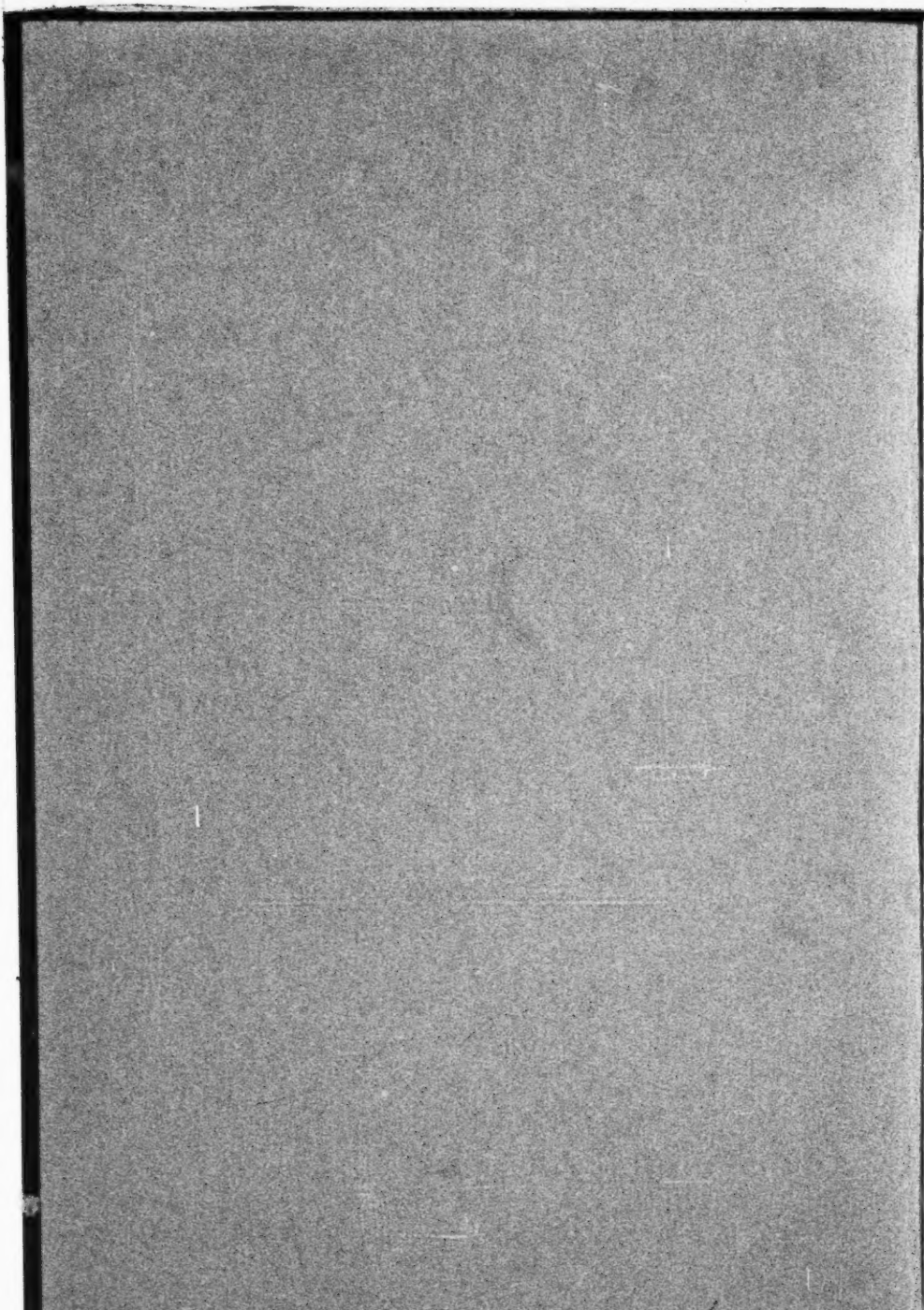

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OPINIONS BELOW

The decision of the District of Columbia Court of Appeals presented in Docket No. 73-686 is reported at 304 A.2d 293 (1973). (Appendix to Petition in No.

73-686). The decision of the District of Columbia Court of Appeals presented in Docket No. 73-687 is unreported. (App. to Petition in No. 73-687).

QUESTION PRESENTED

Should this Court undertake to review decisions of the District of Columbia Court of Appeals which held that an incorporated association, which did not allege that it paid for telephone service or had a "direct stake" in the outcome, was not "affected . . . to a legally cognizable extent" by final decisions of the Respondent Public Service Commission authorizing increased telephone rates and, therefore, failed to satisfy the statutory prerequisite to standing to appeal those decisions. D.C. Code 1973, § 43-705.

STATUTE INVOLVED

District of Columbia Code, 1973 edition, Title 43, Section 705 in pertinent part:[1]

> "The District of Columbia Court of Appeals shall have jurisdiction to hear and determine any appeal from an order or decision of the [Public Service] Commission. Any public utility or any other person or corporation affected by any final order or decision of the Commission . . . may, within sixty days after final action by the Commission upon the petition for reconsideration, file with the clerk of the District of Columbia Court of Appeals a petition of appeal setting forth the reasons for such appeal and the relief sought . . ."

[1] The identical language appears in D.C. Code 1967, § 43-705 (Supp. V 1972) which, at the time of the Association's appeals, was the current edition of the District of Columbia Code as supplemented.

COUNTERSTATEMENT OF THE CASES

The District of Columbia Court of Appeals dismissed for lack of standing petitions of appeal filed by Petitioner Telephone Users Association, Inc. (hereafter "TUA") which sought judicial review of two decisions of the Respondent Public Service Commission of the District of Columbia (hereafter "the D.C. Commission"). *Telephone Users Association, Inc.* v. *Public Service Commission,* 304 A.2d 293 (D.C. Ct. App. 1973); *Telephone Users Association, Inc.* v. *Public Service Commission,* Appeal No. 7126, Order dated April 20, 1973.

The D.C. Commission Record: The D.C. Commission decisions which TUA sought to appeal authorized The Chesapeake and Potomac Telephone Company (hereafter "the Telephone Company") to increase prices for certain telephone services provided within the District of Columbia.[2] In Case No. 570, the D.C. Commission prescribed a restructured rate schedule designed to yield an additional $13.2 million to the Telephone Company.[3] In the second case, Case No. 585, the D.C. Commission authorized a 1% surcharge on billed local telephone charges to permit the Telephone Company to recover a 1% increase in the District of Columbia gross receipts tax which was enacted into law shortly after the D.C. Commission's final decision in Case No. 570.[4]

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[2] The D.C. Commission's authority over the reasonableness and justness of the Telephone Company's rates is derived from the Public Service Law of the District of Columbia enacted by Congress. D.C. Code 1973 § 43-301 *et seq.*

[3] *Chesapeake & Pot. Tel. Co.,* 95 PUR3d 339 (D.C. Pub. Serv. Comm'n 1972), *reconsideration denied,* 96 PUR3d 373 (1972).

[4] *Chesapeake & Pot. Tel. Co.,* Case No. 585, Order No. 5549 (D.C. Pub. Serv. Comm'n 1972).

In Case No. 570, TUA petitioned the D.C. Commission for leave to intervene alleging only that it was a "telephone user" and that it represented "numerous" undisclosed "similarly situated" persons. In Case No. 585, TUA sought to intervene "for the same reasons set forth in Case No. 570 which it adopts here by reference."

In both proceedings, the Telephone Company opposed intervention pointing out, *inter alia,* that TUA did not subscribe to any telephone service; that the service it allegedly "used" was subscribed for, and billed to, Mr. A. S. Curtis; and, that it did not and could not claim standing to intervene on the basis of its "membership".[5] In both cases, the D.C. Commission overruled the Telephone Company's objections and held that ". . . as a telephone user, TUA should be permitted to intervene . . . " (*See,* 304 A.2d at 296).

Although it actively participated in both cases and was encouraged by the D.C. Commission to state its interest in local telephone rates, TUA remained mute concerning what, if any, affect an increase in local telephone rates would have on it and offered no explanation or evidence of its financial stake in the outcome of either case.[6]

TUA eventually appealed the D.C. Commission's final order in each case to the D.C. Court of Appeals

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[5] TUA had previously informed the D.C. Commission that it did not "function" on a membership basis. (*See,* 304 A.2d at 295). In its petition for rehearing in the D.C. Court of Appeals, TUA candidly admitted turning away "thousands" of persons who had applied for membership.

[6] For example, in Case No. 570, TUA flatly refused the D.C. Commission Chairman's request to provide pertinent information about itself (Tr. 421).

pursuant to D.C. Code Section 43-705. The appeal from the first telephone rate order (Case No. 570) was docketed by the D.C. Court of Appeals as Appeal No. 6819. The appeal from the D.C. Commission decision in Case No. 585 was docketed as Appeal No. 7126.

Appeal No. 6819: On October 3, 1972, TUA filed its petition of appeal requesting review of the D.C. Commission's order in Case No. 570. Two months later, TUA filed its opening brief. Neither in its petition nor in its brief did TUA allege any adverse affect on it resulting from the D.C. Commission's order.

In its opposing brief, the Telephone Company contested TUA's standing to appeal the Commission's final order.[7] TUA failed to file a reply brief or otherwise assert that it had a direct economic interest in the order increasing local telephone rates.

By an opinion and order dated April 6, 1973, the District of Columbia Court of Appeals dismissed the petition of appeal because TUA "failed to show it will be 'affected by' the Commission's order to a legally cognizable extent." (304 A.2d at 296).

On April 25, 1973, in a *per curiam* order, the D.C. Court of Appeals denied TUA's petition for rehearing and various accompanying motions.[8]

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[7] The Telephone Company had been permitted to intervene as a respondent in TUA's appeal. *See*, D.C. Court of Appeals Rule 17(g).

[8] Three days after the Court of Appeals' dismissal, TUA applied for telephone service in its own name and, thereafter, filed a barrage of petitions and motions which, in essence, urged the Court of Appeals to consider TUA's changed circumstances. Rule 40 of the D.C. Court of Appeals, which governs petitions for rehearing, requires the petitioner to state facts overlooked or misapprehended by the Court and does not allow the petitioner, as TUA did, to change the operative facts of the Court's decision and seek a rehearing on the basis of the new situation.

Appeal No. 7126: In its petition of appeal from the D.C. Commission's order in Case No. 585, TUA again failed to allege or show any adverse affect flowing from the final order.

The Telephone Company, which intervened as a respondent in Appeal No. 7126, filed a motion to dismiss for lack of standing. TUA again did not respond with even a single allegation of fact showing that it was adversely affected by the D.C. Commission's final order.

On April 20, 1973, the Court, after considering the record, granted the Telephone Company's motion and dismissed TUA's petition of appeal for lack of standing.[9]

Supreme Court Docket Nos. 73-686 and 73-687: On July 5, 1973, TUA petitioned this Court to review the D.C. Court of Appeals' decisions in both cases by filing separate motions to proceed *in forma pauperis* and separate petitions for writs of certiorari. Both motions were denied (42 U.S.L.W. 3193) and, on October 24, 1973, TUA paid the required fees and filed motions to waive printing.

[9] Two weeks elapsed between the D.C. Court of Appeals' dismissal of TUA's petition of appeal in No. 6819 and the dismissal in No. 7126. During that interval, TUA did not attempt to amend its petition of appeal in No. 7126 or respond to the Telephone Company's motion to dismiss for lack of standing.

ARGUMENT

TUA's petitions for writs of certiorari should be denied. No constitutional or substantial federal question is presented. No overriding question of public importance is involved. TUA seeks nothing more than this Court's review of the D.C. Court of Appeals' interpretation of a local statute under unique factual circumstances which, according to TUA, no longer exist.

I. This Court's Policy of Declining to Review Court Decisions Involving Only the Proper Interpretation of a District of Columbia Statute Should Be Followed in this Case.

This Court has stated time and again that, absent compelling constitutional questions, it does not sit to review judicial decisions construing statutes whose operation is limited to the District of Columbia. *See, e.g., Del Vecchio* v. *Bowers,* 296 U.S. 280, 285 (1935); *District of Columbia* v. *Pace,* 320 U.S. 698, 702 (1944); *General Motors Corp.* v. *District of Columbia,* 380 U.S. 553, 556 (1965). Yet, this is precisely what TUA requests this Court to do in both its petitions.

Section 43-705 of the D.C. Code limits the right to appeal a final order of the D.C. Commission to a "person or corporation affected by" that order. Interpreting that provision, the D.C. Court of Appeals denied TUA, a corporation which did not allege that it paid for telephone service, standing to appeal the D.C. Commission's rate orders prescribing increased local telephone rates.[10] The D.C. Court of Appeals' construc-

[10] With no claim before it that TUA sought to represent its "members", the D.C. Court of Appeals had no occasion to address itself to whether, under D.C. Code § 43-705, an organization possesses standing to appeal a D.C. Commission order on behalf of its members who are adversely affected. *Cf., Sierra Club* v. *Morton,* 405 U.S. 727, 739 (1972).

tion of § 43-705 not only has no impact beyond "the Potomac's shores",[11] it has extremely limited, if any, future impact within the District of Columbia. In fact, TUA itself suggests that the certiorari petitions are "moot" because factual circumstances material to the D.C. Court of Appeals' decision have changed due to TUA's own subsequent actions. (TUA's Petition in No. 73-686, p. 9).

II. The Association's Arguments Supporting Its Petitions for Writs of Certiorari Are Baseless and, Therefore, Do Not Merit This Court's Consideration.

TUA urges this Court to grant its petitions for writs of certiorari for three reasons: (1) the D.C. Court of Appeals "based its whole opinion on a misreading of the administrative file"; (2) to rectify a "conflict with the opinion[s] of this Court and . . . the other appellate tribunal in the District of Columbia, namely the United States Court of Appeals for the District of Columbia Circuit"; and (3) in Docket No. 73-687 because the D.C. Court of Appeals gave no basis for its conclusion.

Of the three arguments advanced by TUA, only the alleged "conflict" in decisions merits any discussion and, then, simply because the cases relied on by TUA emphasize the correctness of the D.C. Court of Appeals' decisions. The other two arguments are frivolous.[12]

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[11] *General Motors Corp.* v. *District of Columbia, supra,* 380 U.S. at 556.

[12] The sole basis for TUA's assertion that the D.C. Court of Appeals misread the "administrative file" is that the Court did not consider the language of a D.C. Commission order issued almost three months after the Court's decision and more than two months after the Court denied TUA's petition for rehearing.

The Supreme Court decision relied on by TUA to support its "conflict" argument is *Sierra Club* v. *Morton,* 405 U.S. 727 (1972). In that decision, the Court held that "to obtain standing the party seeking review *must allege facts* showing that he is himself adversely affected . . ." by the decision below. (Emphasis supplied). (405 U.S. at 740). This test requires "more than an injury to a cognizable interest". It "requires that the party seeking review himself be among the injured." (405 U.S. at 734-35). Reiterating the *Sierra Club* standards, this Court in *United States* v. *SCRAP,* 412 U.S. 669 (1973) again emphasized that a party seeking review must himself be among the injured and have a direct stake in the controversy. (412 U.S. at 687).

By way of contrast, TUA, despite repeated challenges to its standing, never alleged a single fact either before the Commission or in its petition of appeal or brief showing that it was "injured" or otherwise possessed a "direct stake" in the outcome.

If TUA had an interest in the level of telephone rates, it was at most an "organizational interest": it was not a customer of the Telephone Company and did not allege that it paid for telephone service. As this Court made clear in both the *Sierra Club* and *SCRAP*

TUA incorrectly asserts that the Court of Appeals gave "no basis" for dismissing the petition of appeal in No. 7126. The fact is that the Court did state its "basis," namely, TUA lacked standing to appeal the D.C. Commission's order. In view of the fact that the D.C. Court of Appeals dismissed TUA's appeal in No. 6819 less than a month earlier and the fact that no additional allegations bearing on the standing issue were advanced by TUA in No. 7126, the Court obviously found it unnecessary to spell out again in detail its reasons for dismissing TUA's appeal from the final order in Case No. 585.

cases, an organizational interest, without more, is an insufficient basis to obtain standing. *Sierra Club* v. *Morton, supra,* 405 U.S. at 739; *United States* v. *SCRAP, supra,* 412 U.S. at 685-87.

Equally lacking in merit is the alleged "conflict" between the D.C. Court of Appeals and the United States Court of Appeals for the District of Columbia Circuit (hereafter "Circuit Court of Appeals"). No such conflict exists as evidenced by the Circuit Court of Appeals' recent decision in *Powell* v. *Washington Metropolitan Area Transit Comm'n,* 151 U.S. App. D.C. 295, 466 F.2d 466 (1972), a decision not cited by TUA. In the *Powell* case, the Circuit Court of Appeals, relying on *Sierra Club* v. *Morton,* held that while a customer of regulated utility services "may" be aggrieved by a commission fare order:

> "[a]n essential ingredient of the aggrievement standard is adversity flowing from the order sought to be reviewed." (151 U.S. App. D.C. at 297; 466 F.2d at 468).

Applying the *Powell* standard, TUA, which was not a customer of the Telephone Company and had never alleged that it paid for telephone service, failed to show the "essential ingredient of . . . adversity flowing from" the D.C. Commission's final orders necessary to possess standing to appeal those orders. In short, the *Powell* decision demonstrates that no "conflict" exists between the D.C. Court of Appeals and the Circuit Court of Appeals.[13]

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[13] The factual basis for the alleged "conflict" is predicated on TUA's post-decision assertion that it "paid" for coin telephone service. TUA attempts to parlay that assertion, made for the first time in its petition for rehearing, into an argument that the D.C.

As a concluding argument, TUA struggles to convey the impression that the D.C. Court of Appeals has closed the courtroom door on paying customers of utilities seeking to appeal D.C. Commission prescribed rate increases. Such is not the case. The Court of Appeals left no doubt that one who "uses *and pays for* telephone service would be affected by any order increasing telephone rates" and, accordingly, possesses the requisite interest under D.C. Code § 43-705 to

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Court of Appeals' decision "conflicts" with decisions of the Circuit Court of Appeals granting standing to transit riders who "put coins" in the transit company's fare boxes. As TUA tacitly admits, the Circuit Court of Appeals' decisions it cites either explicitly or implicitly recognize that the parties who brought the appeals were *paying* customers of the transit company or utility. *See e.g., Bebchick* v. *Public Util. Comm'n*, 109 U.S. App. D.C. 298, 299, 287 F.2d 337, 338 (1961) [in deciding the standing issue, the Circuit Court of Appeals had before it the appellant-transit riders' uncontested sworn affidavits alleging facts showing that each was personally affected by the Commission's order authorizing a transit fare increase] and *United States* v. *Public Utilities Comm'n*, 80 U.S. App. D.C. 227, 151 F.2d 609 (1945) [the standing issue was whether the federal government, as a "customer" of the local electric company, could appeal a decision of one of its own agencies (the D.C. Commission)].

TUA, moreover, overlooks the Circuit Court of Appeals' express holding in *Powell* that even a paying customer's standing is predicated on demonstrating an adverse affect flowing from the Commission's rate order. The *Powell* decision involved an appeal from a WMATC order denying a fare increase. Before the WMATC, transit-rider Powell had not argued that the existing fares should have been lowered. Accordingly, the Circuit Court of Appeals found that Powell had not been "aggrieved" (the statutory standard prescribed to obtain standing to review WMATC orders).

The plain fact is that even if TUA had alleged from the very outset that it paid for coin telephone service it could not have shown any adverse affect upon which to obtain standing to appeal either D.C. Commission rate order. The ten-cent rate for coin telephone service was not changed by the Commission in either decision presented for review and TUA at no time claimed that the existing coin telephone should have been reduced.

appeal a final Commission order. (304 A.2d at 296). *See also, Goodman* v. *Public Service Commission,* 309 A.2d 97 (D.C. Ct. App. 1973) where the D.C. Court of Appeals determined that a residential customer had a right to appeal an order authorizing an increase in electric rates.

In TUA's appeals, despite repeated challenges to its standing, TUA did not allege that it paid for any telephone service affected by the D.C. Commission's final order or otherwise had a "direct stake" in the outcome of those orders. This Court is asked to disregard that simple fact.

CONCLUSION

For the reasons stated above, the petitions for writs of certiorari in Docket No. 73-686 and in Docket No. 73-687 should be denied.

Respectfully submitted,

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